U.S. Department of Labor

Office of Administrative Law Judges
525 Vine Street, Suite 900
Cincinnati, OH 45202

Telephone: (513) 684-3252
Facsimile: (513) 684-6108

Date Issued: February 29, 2000

Case No: 1999-LHC-1242

In the Matter of

GUY GENE CUTSHAW,
Claimant

v.

INDIANA-KENTUCKY ELECTRIC COMPANY,
Employer,

LIBERTY MUTUAL INSURANCE COMPANY,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:

William Nold, Esquire
For the Claimant

Grant Roark, Esquire
For the Employer/Carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER — DENYING BENEFITS

This proceeding arises from a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq* (hereinafter "the Act"). This case was referred to the Office of Administrative Law Judges on

March 19, 1999. Following proper notice to all parties, a hearing was held on November 17, 1999 in Louisville, Kentucky. Briefs on behalf of the Claimant and the Employer were received on January 20, 2000.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witness who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. References to ALJX, CX, EX, and JX refer to the exhibits of the Administrative Law Judge, the Claimant, the Employer, and both parties respectively. The transcript of the hearing is cited as "Tr." and by page number.

ISSUES

The following issues remain for resolution:

1. whether the Claimant is entitled to permanent partial or permanent total disability benefits; and

2. whether the Claimant is entitled to vocational rehabilitation services.

(JX 1).

FINDINGS OF FACT

Factual Background

Mr. Guy Cutshaw testified at the November 17, 1999 hearing. Mr. Cutshaw is a forty-four year old longshoreman with a high school education (Tr. 10). After graduating high school, the Claimant was employed by a contractor and a modular home builder (Tr. 30). Through such experiences, he gained both electrical and carpentry skills (Tr. 11). The longshoreman began working for Indiana-Kentucky Electric Corporation (hereinafter "IN-KY Electric" or "the Employer") on March 3, 1981. The Claimant also wired houses at night and on weekends while working for the Employer; however, he stopped doing this work in "1991 or 1992 when [he] had [his] injury" (Tr. 27, 28). Mr. Cutshaw also has a pilot's license to drive barges within a two mile radius of IN-KY Electric (Tr. 28). At the time of the Claimant's injury, he was working as a barge attendant in the Yard Department of IN-KY Electric (Tr. 12). As a barge attendant, he earned $12.34 per hour (Tr 19).

On October 13, 1990, Mr. Cutshaw and two other employees were on a barge attempting to lift a cable sheave out of the water and over the side of the barge (Tr. 12). The cable sheave weighed approximately three to four hundred pounds (Tr. 12). As the Claimant bent over the side of the barge and began pulling the sheave up over the side of the barge he "heard something or

felt something pop in [his] back" (Tr. 12). Mr. Cutshaw reported the injury to his employer one hour later (Tr. 13).

The longshoreman continued to work with pain until he visited Dr. Rod MacGregor, his family physician, in January 1991 (CX 2). Dr. MacGregor sent the Claimant to King's Daughter Hospital in Madison, Indiana for physical therapy for two weeks (CX 2). On February 19, 1991, Mr. Cutshaw was referred to Dr. Guarnaschelli who admitted him to Jewish Hospital for a meylogram and a computed tomography scan (CX 2). Thereafter, the Claimant underwent back surgery in July 1991(Tr. 15). He testified he has had problems with numbness in his left leg and foot since the surgery (Tr. 16). If Mr. Cutshaw stands or sits for a long time, his foot gets numb and a few minutes pass before the numbness subsides and he is able to walk (Tr. 16). The longshoreman also continues to have problems with his back (Tr. 16). He has muscle spasms in his back when the numbness occurs in his left leg and foot (Tr. 16). When the back spasms occur, the Claimant must lean forward ten or twenty degrees and raise up to get out of a chair (Tr. 17). Mr. Cutshaw testified he experiences back spasms daily or every other day (Tr. 17). When the Claimant gets a back spasm at work, he lies flat on a bench in front of his locker with his knees elevated in an effort to straighten out his back (Tr. 17). When the spasms occur while the longshoreman is at home, he lies down on the floor with his back flat to the floor and his knees elevated until he is able to walk again. The Claimant has been prescribed Vicodin and "other medications" but he tries to take the prescription medications as little as possible (Tr. 26). Mr. Cutshaw testified he now takes Aleve, a nonprescription drug, to relieve his pain (Tr.). The longshoreman was last treated by Dr. Holt in 1998 (Tr. 26). He testified he planned to visit Dr. Holt in December 1999 for a regular check-up. Mr. Cutshaw indicated he has been advised to do certain exercises, like riding a bicycle, to keep his back from tightening up (Tr. 30). Mr. Cutshaw walks every day and rides his bicycle occasionally (Tr. 30).

Mr. Cutshaw sustained a second injury in June 1993 while working at IN-KY Electric (CX 4). At the time of the Claimant's second injury, he was working as a barge tractor operator (Tr. 32). The longshoreman jumped over the side of the barge which was four to five feet high and slipped on some wet coal on the barge walkway (Tr. 32). The Claimant fell approximately ten or eleven feet onto a concrete pier, landing on his right side (Tr. 33). Mr. Cutshaw sustained a pelvis fracture and a nondisplaced hip fracture (Tr. 33). He returned to work in August 1993 (CX 4). The longshoreman worked as a tractor operator until December 1994 when he sustained an eye injury at work (CX 4). The Claimant testified he no longer suffers from hip problems (Tr. 33).

After his July 1991 back surgery, the Claimant returned to work as a barge attendant in September 1991 (CX 4)(Tr. 14). As a barge attendant, the longshoreman would get coal to fuel the electric plant (CX 4). The Claimant continued to experience pain from time to time and eventually saw Dr. Holt, an orthopedic surgeon who recommended a conservative course of treatment. Mr. Cutshaw now works as a coal equipment operator for the Employer and earns $18.88 per hour (Tr. 14, 19). His work schedule consists of working three twelve-hour days and being off two days, then working two twelve-hour days and being off work for three days (Tr. 22). The Claimant stated his job as a coal equipment operator is not less strenuous than his job as

a barge attendant (Tr. 14). He explained that as a barge attendant he performed more tasks involving lifting whereas his job as a coal equipment operator requires the constant use of his hands and legs in operating various types of machinery (Tr. 15). As a coal equipment operator, Mr. Cutshaw operates heavy machinery both on the barges and dry land (Tr. 29). The Claimant stated that operating the equipment on a barge while it is being unloaded subjects him to "more jarring and more vibration" than he experiences when operating the same equipment on dry land (Tr. 29). According to Mr. Cutshaw, he has made several unsuccessful attempts to obtain a less strenuous job with the Employer. The longshoreman successfully bid on a maintenance job within the company; however, he returned to his job in the Yard Department upon learning the maintenance position involved a lot of heavy lifting and strenuous work (Tr. 19). The Claimant testified other jobs have become available within the company but he does not have enough seniority to bid on the "lighter jobs" which would pay the same as his current job (Tr. 21, 24). Mr. Cutshaw has not sought employment outside of IN-KY Electric (Tr. 19). The longshoreman believes he would not be able to receive the pay and benefits he is getting now if he starts over with another company (Tr. 21).

The Claimant testified about a few other jobs with the Employer that may be less strenuous (Tr. 26). Two of the jobs are jobs in the Employer's store, but the Claimant testified that "rumor has it that people from guards are going to go into that job, because [the Employer] is going to do away with the guard force...." (Tr. 26). The longshoreman was also aware of a fire equipment maintainer position that is going to be available, but he stated the position is rumored to be filled by one of the guards whose job is being phased out (Tr. 27).

Mr. Cutshaw testified he would like the Employer to pay for him to attend classes to obtain a degree in electronics so he can get an electronics job in the Performance Department of IN-KY Electric (Tr. 22). Mr. Cutshaw is concerned that if his back problems ever force him to leave his job as a coal equipment operator, he would not have the level of education required to work in a field in which he could earn a salary comparable to his current salary (Tr. 23). The Claimant believes the electronics job would pay approximately the same wage he is currently earning and would be a less strenuous position (Tr. 22). The longshoreman has explored vocational training opportunities in the electronics field at both IV Tech and ITT; however, he believes the hours he works as a coal equipment operator prohibit him from enrolling in either program (Tr. 21). Mr. Cutshaw hopes to continue working for IN-KY Electric and the Employer has given him no indication that he cannot do so (Tr. 23).

Medical Evidence

The medical evidence contains records of Dr. Guarnaschelli's treatment of Mr. Cutshaw from February 19, 1991 to August 4, 1992 (CX 1). On February 19, 1991, the Claimant was referred to Dr. Guarnaschelli by Dr. Rod MacGregor. Notes dated the same day indicate Mr. Cutshaw was suffering from a "constant, excruciating pain in his lower back which radiate[d] into his lift hip and upper thigh and to a lesser degree distally into his thigh and calf." Dr. Guarnaschelli commented that although the Claimant had a "previous back sprain in the past, [the

Claimant] had not had a previous persistent leg pain of this nature." The physician noted "radiographic evidence of a central disc protrusion and perhaps a small herniation at L5-S1." Dr. Guarnaschelli's notes indicate Mr. Cutshaw was admitted to Jewish Hospital on February 20, 1991. A lumbar myelogram taken the same day revealed "nonfilling of the left-sided nerve root at L5-S1." A post myelogram computed tomography scan revealed a left-sided L5-S1 disc herniation. On April 15, 1991, the physician noted Mr. Cutshaw had apparently been diagnosed with mononucleosis by Dr. MacGregor. At that time, the Claimant was continuing to work on a light duty basis and expressed a willingness to resume his full duties on a trial and error basis. During his May 21, 1991 visit to Dr. Guarnaschelli, the Claimant continued to have the same symptoms and expressed an interest in obtaining a second medical opinion about his condition.

Dr. Guarnaschelli's July 16, 1991 notes indicate Mr. Cutshaw's pain "remain[ed] intractable" and the Claimant was suffering from cramping sensations and sensory disturbances in his calf and foot. On July 22, 1991, Mr. Cutshaw was admitted to Jewish Hospital and underwent a left hemilaminotomy, foraminotomy, and a microsurgical discectomy. The Claimant was released from the hospital three days later. The physician's July 25, 1991 discharge summary indicates Mr. Cutshaw experienced "excellent relief" of his leg pain after the surgery. Dr. Guarnaschelli's pre-operative and post-operative diagnosis was a left L5-S1 disc herniation. Dr. Guarnaschelli saw the Claimant again on August 15, 1991. The Claimant complained of occasional, intermittent numbness in his calf and foot, especially when sitting. The physician indicated the longshoreman was hesitant to return to work unless he had reached his full capacity because his job required a lot of lifting, tugging, and other heavy work. Dr. Guarnaschelli noted light duty work was available to the Claimant, but Mr. Cutshaw felt his current symptoms would not permit him to tolerate the light duty work. On October 31, 1991, the Claimant underwent a magnetic resonance imaging (hereinafter "MRI") of the lumbar spine. According to Dr. Jeffrey Weiss, the MRI revealed chronic disc degeneration, post operative fibrosis on the left at L5-S1, level and mild disc degeneration at the L4-L5 level. Dr. Weiss found no evidence of recurrent disc herniation.

On January 23, 1992 Dr. Guarnaschelli's records indicate the Claimant and the Employer arranged for the Claimant to be placed on light duty for two to three months. The Claimant was still having reoccurring symptoms. During a February 5, 1992 visit to Dr. Guarnaschelli, Mr. Cutshaw again asked about obtaining a second opinion because he was worried about his leg. As of June 17, 1992, the physician's records indicate Mr. Cutshaw had resumed working on a full duty basis; however, the Claimant had switched from job to job on full duty and had some recurrence of symptoms. Dr. Guarnaschelli next treated Mr. Cutshaw on July 30, 1992. The physician noted the Claimant continued to have symptoms consistent with radiculopathy down the left leg. Dr. Guarnaschelli also noted the longshoreman had a "slight decreased toe walk on the left side." The physician referred the Claimant to Dr. Robert Falk at the Magnetic Resonance Imaging Center in Louisville, Kentucky. On August 1, 1992, Dr. Falk examined the Claimant and diagnosed the Claimant with bilateral foraminal narrowing at L5-S1and epidural fibrosis on the left at the same level. The physician found no evidence of recurrent disc herniation. A medical record from Jewish Hospital dated August 7, 1992 indicates Mr. Cutshaw underwent a series of

lumbar spine x-rays which revealed "disc space narrowing at L5-S1 presumably secondary to degenerative disc disease," but was otherwise negative.

On May 28, 1991, Mr. Cutshaw was examined by Dr. W. W. Kotcamp for the purposes of obtaining a second opinion regarding his lower back injury (CX 2). An examination of the Claimant revealed a 25% flexion limitation, a 10% hyperextension limitation, a one-pulse left ankle jerk and physiologic knee and right ankle jerks. The physician noted Mr. Cutshaw suffers from "occasional tingling in his toes" but Mr. Cutshaw felt he was improving overall. Dr. Kotcamp noted the Claimant was not taking any pain medication at that time. Based on the examination, an x-ray, a computed tomography scan and a February 20, 1991 meylogram, Dr. Kotcamp diagnosed Mr. Cutshaw with an L5-S1 disc herniation. The physician opined the Claimant had no real weaknesses at that time. He indicated if Mr. Cutshaw does not respond to his exercises, he could have the disc excised. Dr. Kotcamp thought the Claimant's chances of "getting any nerve root deficit" by undergoing conservative therapy as opposed to undergoing surgical therapy were not very different. The physician also noted Mr. Cutshaw was performing "fairly heavy work and [ran] a Bobcat when unloading ...barges." Dr. Kotcamp commented the vibration from the equipment did not seem to bother the Claimant as much as "just plain sitting." As of May 1991, Dr. Kotcamp thought the Claimant was doing satisfactorily with his back injury. Nevertheless, the physician noted if the Claimant's condition became more severe, the Claimant could have a surgical excision.

The medical evidence of record contains a series of medical notes written by Dr. Richard Holt (CX 3). The medical notes summarize visits the Claimant made to Dr. Holt from August 1992 to November 3, 1998. On August 25, 1992, the Claimant visited Dr. Holt because of back pain and left leg pain. At that time, Dr. Holt recommended the Claimant take epidural steroids and did not recommend a spinal fusion. The physician stated a spinal fusion is an alternative for Mr. Cutshaw if he gets to the point where he cannot live with the pain. Dr. Holt diagnosed the longshoreman with degenerative disc disease with postoperative pain secondary to epidural scarring. The physician noted Mr. Cutshaw underwent an "L5/S1 discectomy" on July 24, 1991, which relieved the Claimant's leg pain for approximately two days.

On November 23, 1992, Mr. Cutshaw was examined by Dr. Ricciardi in consultation with Dr. Holt (CX 3). The physician noted the Claimant was working and continued to experience leg pain, but he was not taking any pain medication. Dr. Ricciardi noted "a little irritability on the left with straight leg raising" but stated the Claimant did not want or need a surgical procedure. The physician stated he explained to Mr. Cutshaw that his residual pain probably stems from scar tissue which was revealed by the Claimant's MRI. Dr. Ricciardi stated there is no treatment for the scar tissue. The physician opined the Claimant has a "probable residual physical impairment of 10% following his disc surgery."

Dr. Holt's notes indicate that on May 18, 1993 the longshoreman was experiencing the same symptoms and continued to work. The physician noted that "overall, the [Claimant's] pain is less than it was a few months [prior]." The notes also indicate the Claimant's second injury at work occurred on June 12, 1993. Mr. Cutshaw was transferred from a hospital in Madison,

Indiana to Jewish Hospital in Louisville, Kentucky on June 14, 1993. The longshoreman was dismissed from Jewish Hospital on June 15, 1993. On July 6, 1993 a computed tomography scan revealed the Claimant suffered a nondisplaced pelvic fracture. At that time, Dr. Holt ordered Mr. Cutshaw to stay off work for two months.

During a September 7, 1993 visit to Dr. Holt, Mr. Cutshaw complained of pain in his right hip and increased axillary sweat on his right side. Dr. Holt advised the Claimant to return to work on September 13, 1993 with no restrictions. Dr. Werner examined Mr. Cutshaw on October 19, 1993 in consultation with Dr. Holt. Mr. Cutshaw was continuing to experience some hip pain. The physician noted the Claimant's bone scan revealed a nondisplaced acetabular fracture. Dr. Werner thought the Claimant may be experiencing some post-traumatic arthritis as a result of the fracture. The physician suggested Mr. Cutshaw monitor his weight and engage in certain nontraumatic exercises which could slow down the arthritis.

On February 28, 1994, Dr. Majd in consultation with Dr. Holt diagnosed the Claimant with degenerative disc disease. The Claimant complained of right hip pain. The physician noted the miner's pelvic fracture was completely healed. Dr. Majd thought Mr. Cutshaw's sacroiliac pain was related to his fall at work and the pelvic fracture. During an October 29, 1996 visit to Dr. Holt, the Claimant indicated the back pain he had had which radiated into his right leg had ceased. A November 2, 1998 MRI revealed "anterior protrusion of disc at L5-S1 with endplate sclerosis, marginal spurring and posterior spurring at L5-S1, and some anterior spurring at T11/12." On November 3, 1998, Dr. Holt reviewed the Claimant's MRI and stated it revealed degenerative changes at L5-S1, the site of the miner's previous surgery. On that day, Dr. Holt advised Mr. Cutshaw to obtain a "lower stress job that would not require vibratory stress, overhead work, or heavy lifting."

Only one physician, Dr. S. Pearson Auerbach, examined Mr. Cutshaw for the purpose of determining whether the miner suffers from a functional impairment and assessing the degree of the impairment (CX 4). Dr. Auerbach examined the Claimant on July 25, 1995. Pressure over the sciatic notch and the sciatic stretch test were not remarkable. Dr. Auerbach thought the Claimant's back injury resulted from a herniated disc and was resolved when the disc was removed. The physician indicated Mr. Cutshaw "apparently did well until he fell in 1993 and sustained fractures of the ribs and pelvis." Nevertheless, Dr. Auerbach opined the Claimant's pelvic and rib fractures have healed. Dr. Auerbach further opined Mr. Cutshaw has a 10% permanent functional impairment to his body as a whole due to his back injury. Dr. Auerbach opined the functional impairment to the Claimant's back is an "aggravation of a pre-existent, non-disabling condition." The physician cautioned the Claimant "to be careful about doing repetitive bending and lifting." Dr. Auerbach stated that with care, the longshoreman can occasionally lift fifty pounds, particularly if he lifts with his legs.

Stipulations

The parties have stipulated and I find that:

1. The Act (33 U.S.C. § 901, *et. seq.*) applies to this claim.

2. The Claimant and the Employer were in an employer-employee relationship at the time of the accident/injury.

3. The accident/injury arose out of and in the scope of the Claimant's employment.

4. The accident/injury occurred on October 13, 1990.

5. The Employer was advised of or learned of the accident/injury on October 13, 1990.

6. Timely notice of the injury was given to the Employer.

7. The Employer filed a First Report of Injury (Form LS-202) on January 23, 1991.

8. The Claimant filed a timely claim for compensation on October 28, 1992.

9. The Employer filed a timely Notice of Controversion on November 10, 1992.

10. The Claimant's average weekly wage at the time of his injury was $518.56.

11. Disability payments have been made to the Claimant as follows: temporary total disability from February 2, 1991 to March 10, 1991, July 16, 1991 to November 12, 1991, and from January 28, 1992 to February 5, 1992 , at the rate of $345.72 per week for a total of $7,358.91.

12. All reasonable and necessary medical benefits have been paid by the Employer.

13. Since the date of the accident/injury, the Claimant has returned to his regular employment with the Employer on March 11, 1991, November 13, 1991, and February 6, 1992.

14. The Claimant reached his maximum medical improvement on February 6, 1992; and

15. The Employer filed a Notice of Final Payment or Suspension of Compensation Payments (Form LS-208) on February 11, 1993.

(JX 1).

CONCLUSIONS OF LAW

Disability Generally

As discussed above, the parties have stipulated and I have found the evidence establishes the Claimant sustained an injury, as defined under the Act, to his lower back arising from his employment with IN-KY Electric. Therefore, the primary issue remaining for resolution is the nature and extent of any disability that is caused by the Claimant's injury. The Act defines "disability" as an "incapacity because of injury to earn wages which the employee was receiving at the time of the injury in the same or any other employment." 33 U.S.C. § 902(10). Generally, disability is discussed in terms of the extent of the disability, either total or partial, and the nature of the disability, either temporary or permanent. A claimant bears the burden of establishing both the nature and extent of his or her disability. *Eckley v. Fibrex and Shipping Co.*, 21 BRBS 120, 122 (1988); *Trask v. Lockheed Shipbuilding and Constr. Co.*, 17 BRBS 56, 59 (1985).

Extent of Disability

The extent of a claimant's disability is an economic concept. In order for a claimant to receive a disability award, the claimant must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to either have no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss of wage-earning capacity, a total loss, or a partial loss. In order for the claimant to receive an award of compensation, the evidence must establish the claimant's injury resulted in a loss of wage earning capacity. *See Fleetwood v. Newport News Shipbuilding & Drydock Co.*, 776 F.2d 1225, 1229 (4th Cir. 1985); *Sproull*, 25 BRBS at 110.

The Act defines "total disability" as the "complete incapacity to earn pre-injury wages in the same work as at the time of the injury or in any other employment." A claimant establishes a *prima facie* case of total disability by showing he cannot perform his usual work because of a work-related injury. The claimant's regular duties at the time he was injured constitute his "usual work." *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). Thus, even a minor impairment can render a claimant totally disabled if the impairment prevents the employee from performing his usual employment. *Elliott v. C&P Telephone Co.*, 16 BRBS 89, 92 n. 4 (1984). The claimant's credible complaints of pain alone may be enough to meet his burden. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Richardson v. Safeway Stores*, 14 BRBS 855 (1982); *Miranda v. Excavation Constr.*, 13 BRBS 822, 884 (1981); *Golden v. Eller & Co.*, 8 BRBS 846 (1978), *aff'd* 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). At this initial stage, the claimant does not have to establish he cannot return to any employment, only that he cannot return to his former employment. *Elliott*, 16 BRBS at 89 (1984).

Once a *prima facie* case is established, the claimant is presumed to be totally disabled, and the burden shifts to the employer to prove the availability of suitable alternate employment. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986). If the employer establishes the existence of such employment, the claimant's

disability is treated as partial rather than total. Nevertheless, the claimant may rebut the employer's showing of suitable alternate employment by demonstrating he diligently sought, but was unable to obtain, such employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2d Cir. 1991); *Carroll v. Hanover Bridge Marine*, 17 BRBS 176 (1985); *Bell v. Volpe/Head Constr. Co.*, 11 BRBS 377 (1979).

In determining whether Mr. Cutshaw has established he cannot perform his usual employment, I must compare Mr. Cutshaw's medical restrictions with the specific requirements of his usual employment. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988); *Mills v. Marine Repair Serv.*, 21 BRBS 115, *on recon.*, 22 BRBS 335 (1988); *Carroll v. Hanover Bridge Marine*, 17 BRBS 176 (1985); *Bell v. Volpe/Head Constr. Co.*, 11 BRBS 377 (1979). At the time of Mr. Cutshaw's October 1990 injury, Mr. Cutshaw was working as a barge attendant in the Yard Department of IN/KY Electric (Tr. 12). As a barge attendant, the claimant delivered the coal to fuel the electric plant (CX 4). The claimant's job involved "a lot of lifting, tugging, and other heavy work" (CX 1). Therefore, I find Mr. Cutshaw's usual employment as a barge attendant was physically rigorous and involved a lot of heavy lifting. On July 25, 1995, Dr. Auerbach cautioned the Claimant about doing repetitive bending and lifting (CX 4). On November 3, 1998, Dr. Holt, a physician who has treated the Claimant since August 1992, advised Mr. Cutshaw to obtain "a lower stress job that [does] not require vibratory stress, overhead work, or heavy lifting" (CX 3). Because Dr. Holt has been Mr. Cutshaw's treating physician since 1992, I give great weight to his opinion. I find these medical restrictions are inconsistent with the ability to perform a physically rigorous job. Consequently, I find Mr. Cutshaw has proven a *prima facie* case of total disability by establishing he cannot return to his regular employment as a barge attendant.

Because Mr. Cutshaw has established a *prima facie* case of total disability, the burden now shifts to the employer to demonstrate the availability of suitable alternative employment. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986). The employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which the employee is capable of performing considering the employee's age, education, work experience, physical restrictions, and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F. 2d 1031, 1042-3, 14 BRBS 156, 164-5 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977). An employer can satisfy its burden of establishing the availability of suitable alternative employment by offering the claimant a job in its facility, so long as the job does not constitute sheltered employment. *Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Nevertheless, if the employer offers a job that is too physically demanding for the claimant to perform, the job does not constitute suitable alternate employment. *Bumble Bee Seafoods v. Director, OWCP*, 629 F. 2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980); *Perini Corp. v. Heyde*, 306 F. Supp. 1321, 1328 (D.R.I. 1969); *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984).

The Benefits Review Board has emphasized that only exceptional circumstances will warrant an award of total disability concurrent with a period in which the claimant is working.

Shoemaker v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 141, 145 (1980); *Chase v. Bethlehem Steel Corp.*, 9 BRBS 143 (1978); *Ford v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 687 (1978). An award of total disability concurrent with continued employment typically has been limited to two situations. The first situation involves "sheltered employment" and occurs when the claimant's post-injury employment is due solely to the beneficence of the employer. *Walker v. Pacific Architects & Eng'rs*, 1 BRBS 145, 147-48 (1974). The Benefits Review Board has defined "sheltered employment" as an unnecessary job for which an employee is paid even if he cannot perform the job. *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). Sheltered employment does not constitute suitable alternate employment. The second situation which supports an award of total disability for a working claimant occurs when the claimant continues his employment due to an extraordinary effort and in spite of excruciating pain and diminished strength. *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 451, 7 BRBS 838, 850 (4th Cir. 1978), *aff'g* 5 BRBS 62 (1976).

Based on the evidence of record, I find Mr. Cutshaw's job as a coal equipment operator does not constitute sheltered employment. I further find the evidence does not establish that Mr. Cutshaw performs his current job due to extraordinary effort and in spite of excruciating pain and diminished strength. As a coal equipment operator, the Claimant operates conveyors, bulldozers, and barge tractors on land and on barges (Tr. 14). The longshoreman testified he is subjected to much more jarring and vibration when he operates equipment on barges than when he operates the same equipment on land (Tr. 30). The record contains no evidence indicating the job of a coal equipment operator is an unnecessary job. Additionally, I note the job of a coal equipment operator is not too physically demanding for the Claimant to perform. Although in November 1998, Dr. Holt, the Claimant's treating physician, advised the Claimant to obtain a less strenuous job, I find the objective evidence does not indicate Mr. Cutshaw cannot perform his current job. The Claimant continues to work as a coal equipment operator without the beneficence of the employer. More importantly, Mr. Cutshaw may have been operating heavy equipment for the employer for a number of years even though he contends the job is too strenuous.[1] Additionally, the record does not indicate the Claimant's back pain and leg numbness have caused the Claimant to repeatedly be absent from work. Mr. Cutshaw testified that if he suffers back pain and leg numbness while at work, the pain and numbness subsides when he lies down on a bench during his break with his back flat on the bench and his knees elevated (Tr. 17). It is also significant to note the medical evidence of record does not indicate Mr. Cutshaw has a history of taking a lot of pain medication.[2] Moreover, at the time of the November 1999 hearing, Mr. Cutshaw had not seen a

---

[1]Dr. Kotcamp's notes indicate the claimant was operating heavy equipment for IN/KY Electric as early as May 1991 (CX 2).

[2]When Dr. Kotcamp examined the claimant on May 28, 1991, he noted the claimant was not taking any pain medication (CX 2). At the time of Dr. Holt's August 25, 1992 examination, the physician noted Mr. Cutshaw was not suffering from any back pain and was not taking any pain medication (CX 3). Furthermore, Mr. Cutshaw testified he had taken "a whole lot of pain medication" in the past, but he has "backed off" his prescription pain medication and has started

physician for his back and leg problems for one year (Tr. 26). All of these facts weigh against a finding that Mr. Cutshaw's job constitutes sheltered employment. These facts also fail to establish that Mr. Cutshaw continues to work as a coal equipment operator in spite of excruciating pain and through extraordinary effort. Therefore, I find the Employer has satisfied its burden of establishing the availability of suitable alternate employment. Accordingly, I find the Claimant is partially disabled. Now, I must determine whether the Claimant's disability is permanent or temporary in nature.

Nature of Disability

Courts have devised two legal standards to determine whether a disability is permanent or temporary in nature. Under one standard, a disability will be considered permanent if, and when, the employee's condition reaches maximum medical improvement. *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *Trask*, 17 BRBS at 60. Under another standard, a permanent disability is one that has "continued for a lengthy period and...appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F. 2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Although these two standards are distinguishable, both standards define the permanency of a disability in terms of the potential for further recovery from injury.

As discussed above, the parties have stipulated and I have found the Claimant reached his maximum medical improvement on February 6, 1992 (JX 1). Furthermore, the impairment from which Mr. Cutshaw suffers has continued for approximately nine years and thus appears to be of a lasting duration. Therefore, I find the partial disability from which the Claimant suffers is permanent in nature.

Compensation for Unscheduled Permanent Partial Disability

Section 8(c)(21) of the Act provides that an award for an unscheduled permanent partial disability "shall be 66 2/3 per centum of the difference between" a claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. The parties have stipulated and I have found the Claimant's average weekly wage at the time of his injury was $518.56. Thus, I must determine the Claimant's current wage-earning capacity.

Section 8(h) of the act sets forth a two-part analysis for determining a claimant's post-injury wage-earning capacity. 33 U.S.C. § 908(h); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979). The first prong of the analysis requires an administrative law judge to determine whether the claimant's post-injury wages reasonably and fairly represent the claimant's wage-earning capacity. *Randall v. Comfort Control, Inc.*, 725 F. 2d 791, 796, 16 BRBS 56, 64 (CRT)(D.C. Cir. 1984). If the claimant's actual wages are not representative of the

---

taking a nonprescription pain reliever (Tr. 18).

claimant's wage-earning capacity, the second prong of the analysis requires the judge to arrive at a dollar-amount which fairly and reasonably represents the claimant's wage-earning capacity.

An administrative law judge may consider the following factors at both levels of the analysis discussed above: the claimant's age, educational history, industrial history, and physical condition; the number of hours the claimant works per week; the number of weeks the claimant works per year; the availability of employment the claimant can perform after the injury; the beneficence of the claimant's employer; the claimant's earning power in the open market; whether the claimant must use more time, effort or expertise to achieve pre-injury production levels; whether medical and other circumstances indicate a probable future wage loss due to the claimant's injury; and, the continuity and stability of the claimant's post-injury work. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 117 S. Ct. 1953 (1997), 1997 U.S. Lexis 3864, 21; *Abbott v. Louisiana Ins. Guaranty Ass'n.*, 27 BRBS 192 (1993), *aff'd*, 40 F. 3d 122 (5th Cir. 1994); *George v. California Stevedore & Ballast Co.*, BRB No. 92-2235, 4 (Aug. 30, 1996)(unpublished); *Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273, 276 (1990)(citations omitted)*; Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149, 153 (1988); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 651 (1979); *Hughes v. Litton Sys.*, 6 BRBS 301, 304 (1977). I note this list of factors is not exhaustive and I need not consider every possible factor as long as my final determination of wage-earning capacity is reasonable and based on appropriate factors *Devillier*, 10 BRBS at 661. A comparison of pre-injury wages and post-injury wages does not give a judge enough information to compute lost earning capacity. *Walsh v. Norfolk Dredging Co.*, 22 BRBS 67, 77-78 (CRT)(4th Cir. 1989)(unpublished). The fact a claimant is earning "the same or more money following his injury is not determinative of whether [the claimant] has sustained a loss in wage-earning capacity." *Container Stevedoring Co. v. Director, OWCP*, 935 F. 2d 1554, 1551, 24 BRBS 213, 222-23 (CRT)(9th Cir. 1991)*; Frye v. Potomac Elec. Power Co.*, 21 BRBS 194, 199 (1988) .

In considering some of the factors discussed above, I note the evidence of record contains no indication that Mr. Cutshaw's job as a coal equipment operator is in jeopardy. The Claimant's current job appears to be a stable one. Furthermore, the Claimant's physical condition does not prevent him from performing the job of a coal equipment operator. Although Dr. Holt advised the Claimant to seek a less strenuous job in 1998, the Claimant's medical records do not indicate the Claimant loses a lot of work for medical treatment necessitated by his back injury. *Barnes v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 528, 532 (1978), *pet. dismissed mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 590 F. 2d 330, 9 BRBS 453 (4th Cir. 1981). At the time of the hearing, Mr. Cutshaw had not been seen by a physician for his back problems in one year (Tr. 26). Also, a significant number of the Claimant's visits to Dr. Holt were necessitated by the Claimant's 1993 hip injury rather than the Claimant's lower back injury. Moreover, as discussed above, Mr. Cutshaw's current job is not due solely to the beneficence of the Employer. The Claimant presented no evidence that the Employer arranges job locations to meet his physical restrictions, places him in unnecessary jobs, hires extra people to help the Claimant with his work, or pays the Claimant more than other coal equipment operators. *Burch v. Superior Oil Co.*, 15 BRBS 423, 427 (1983). I also note Mr. Cutshaw works a significant number of hours each week. The Claimant testified he works in twelve-hour shifts

(Tr.22). He stated he will work for three days and be off for two days and then he returns and works two days and is off for three days (Tr. 22). Additionally, the evidence of record does not establish the Claimant is likely to incur a future wage loss due to his injury. Several physicians diagnosed the Claimant with degenerative disc disease; however, such diagnoses alone do not establish the disease will cause Mr. Cutshaw to suffer a future loss in earning capacity. Moreover, Mr. Cutshaw is only forty-four years old and, as discussed above, has not established he is incapable of performing his current job as a coal equipment operator. The job of a coal equipment operator is not only a job the Claimant can perform, but also is a job the Claimant continues to perform even though he contends the job is too strenuous. All of these factors weigh in favor of finding the Claimant's actual wages are representative of the Claimant's wage-earning capacity.

Mr. Cutshaw argues he is only earning a higher wage now than at the time of his injury because he continues to work for the Employer. I note the party contending the claimant's actual wages are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. *Grage v. J.M. Martinac Shipbuilding,* 21 BRBS 66, 69 (1988), *aff'd sub nom., J.M. Martinac Shipbuilding v. Director, OWCP,* 900 F. 2d 180, 23 BRBS 127 (CRT)(9th Cir. 1990). Because Mr. Cutshaw is now earning a higher wage than his average weekly wage at the time of his injury, he is the only party who would argue his current wages are not representative of his wage-earning capacity; however, the only evidence Mr. Cutshaw has presented on this issue is his own testimony that he would not be able to earn his current wage if he were to seek employment outside of IN/KY Electric (Tr. 21). Such a statement fails to demonstrate an alternative reasonable wage-earning capacity. Therefore, in the absence of any evidence to the contrary, I find the Claimant's current wage of $18.88 per hour is representative of his wage-earning capacity. Because Mr. Cutshaw's wage-earning capacity is greater than his average weekly wage at the time of his injury, I find the Claimant is not entitled to any compensation under Section 8(c)(21) of the Act.

De Minimis Awards

In the Claimant's post-hearing brief, the Claimant concedes he has no present loss of wage-earning capacity, but seems to infer he may sustain a loss of wage-earning capacity at some future date.[3] The United States Supreme Court has held that a *de minimis* award is appropriate where a claimant suffers from a proven medical disability which presently causes no loss of wage-earning capacity, but which the employee reasonably expects to cause a future loss in wage-earning capacity. *Metropolitan Stevedore Co.*, 521 U.S. at 121; *Randall v. Comfort Control, Inc.*, 725 F. 2d 791, 800, 16 BRBS 56, 69-70 (CRT)(D.C. Cir. 1984), *vacating* 15 BRBS 233 (1983). The Benefits Review Board has held that a judge may not make a *de minimis* award based on mere speculation of future harm that is not supported by any evidence in the record. *Smith v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 287, 289 (1984); *Winston v.*

[3]In his post-hearing brief, the Claimant argues the evidence "support[s] a finding of a loss of wage-earning capacity notwithstanding the lack of a present loss."

Ingalls Shipbuilding, 16 BRBS 168, 172-73 (1984). Mr. Cutshaw has presented no evidence that his employment as a coal equipment operator requires the employer's beneficence or that his job as a coal equipment operator is unstable. *See Adams v. Washington Metropolitan Area Transit Authority*, 21 BRBS 226 (1988). The only evidence in support of a reasonable expectation of a future loss of earning capacity is the Claimant's statement that he has "thought" about seeking employment outside of IN/KY Electric but he would not be able to receive the pay and benefits he receives from IN/KY Electric (Tr. 21). This speculative statement is not supported by any other evidence of record. Therefore, I find Mr. Cutshaw is not entitled to a *de minimis* award because he has not proven he reasonably expects to incur a future loss of wage-earning capacity.

Vocational Rehabilitation

Even if the Claimant were entitled to an award under the Act, I have no jurisdiction to address his request for vocational rehabilitation services. An award of vocational rehabilitation expenses under Section 39(c)(2) of Title 33 of the United States Code is subject to the discretion of the Secretary of Labor. The Secretary of Labor has delegated to the Office of Workers' Compensation Programs the authority to direct vocational rehabilitation of permanently disabled employees. *See generally* 33 U.S.C. § 939(c)(2); 20 C.F.R. §§702.501-702.508. Therefore, an employee's request for payment of rehabilitation expenses under Section 39(c)(2) must be made to the District Director for the compensation district in which the claimant's injury occurred, and not to the Office of Administrative Law Judges. *Cooper v. Todd Pacific Shipyards Corp.*, 22 BRBS 37 (1989). Furthermore, a claimant must currently be receiving compensation under a continuing award in order to seek vocational rehabilitation services from the District Director. *Olsen v. General Engineering & Machine Works*, 25 BRBS 169 (1991).

Conclusion

Although the evidence establishes the Claimant suffers from a permanent partial disability resulting from his work-related injury, the evidence does not establish the Claimant has suffered a loss in his wage-earning capacity or reasonably expects to suffer a future loss in earning capacity. Accordingly, Mr. Cutshaw is entitled to neither a *de minimis* award nor an award under Section 8(c)(21) of the Act. Therefore, Mr. Cutshaw's claim must be denied.

ORDER

The claim of Guy Cutshaw for benefits under the Act is denied.

JOSEPH E. KANE

Administrative Law Judge